

'My tongue is mine ain':

Copyright, the Spoken Word and Privacy

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Abstract: This article shows how under the present legislation in the United Kingdom copyright may exist in speech, in particular in interviews and conversations, provided that the words are recorded and constitute an original work. The argument is illustrated and supported by reference to reported cases from throughout the common law world, as well as to news stories ranging from interviews with Lord Denning and Michael Jackson. Issues arising from the collection of oral history are also discussed. It is further argued that, in addition to the internal analysis of copyright itself, such protection for the spoken word can be justified by the privacy and personality interests of speakers in the use of what they say.

11,953 words.

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My tongue is mine ain, true Thomas said,

A gudely gift ye wad gie to me

I neither dought to buy or sell

At fair or tryst where I may be.

I dought neither speak to prince nor peer

Nor ask of grace from fair ladye.

(True Thomas's refusal of the Queen of Elfland's gift of the tongue that can never lie.)¹

A Introduction

In April 1989 Mrs Pamela Bordes, 'a lady who has enjoyed and is enjoying certain publicity value for her alleged relationships with people who are in the public eye',² talked with Mr Frame of the Daily Express while in a plane on the way from Bali to Hong Kong. In October 1989 Miss Marina Ogilvy, a member of the Royal Family who was at the time pregnant but not married, was interviewed for eight and a half hours by Mr Brough of Today. Both encounters were reported in the respective newspapers, including verbatim quotations of what the interviewees had said. In the summer of 1990 the late Lord Denning, the retired Master of the Rolls, gave an interview to the author and journalist A N Wilson. Denning made various controversial remarks about the way in which Irish terrorist convictions should have been handled, in particular those of the 'Guildford Four', a group which had then recently been released from prison after it was established that they

¹ From 'The Ballad of True Thomas', first published by Sir Walter Scott in his *Minstrelsy of the Scottish Border* (Edinburgh, 1802), and quoted from J. MacQueen and T. Scott (eds), *The Oxford Book of Scottish Verse* (Oxford: Oxford University Press, 1966), 304. The late Alan Bruford (School of Scottish Studies, University of Edinburgh) drew my attention to these lines when using them to provide the title of a conference on copyright and oral history on 21 October 1989, the first (but not the last) occasion on which I attempted to address the issues discussed in this paper. This final version of that paper is dedicated to Alan's memory, in gratitude and affection.

² *Express Newspapers plc v News (UK) Ltd* [1990] FSR 359, 361, per Sir Nicolas Browne-Wilkinson VC. Mrs Bordes was alleged to be involved in simultaneous relationships with two well-known editors of national Sunday newspapers as well as a member of the Conservative Government and a number of other Tory MPs. Simultaneously she had

had been wrongly convicted of an IRA bombing outrage. Denning said that the Four had probably committed the bombings but that it could not be proved; and that retaining capital punishment would have prevented the problems arising. The interview was published verbatim in *The Spectator* magazine on 18 August;³ one week later the journal published an apology to the Guildford Four from Denning, Wilson, the editor and the journal.⁴

The publication of these three unconnected interviews and subsequent events made lawyers and the general public aware that the spoken word can have copyright, even when there is no preceding written text. The Bordes and Ogilvy interviews became the focal points of court actions for copyright infringements between the proprietors of the *Daily Express* and *Today*, to be discussed in detail later in this article, but in which it was recognised that the interviewees held copyright in what they had said to their interviewers.⁵ No litigation arose from the Denning interview, but he was reported as having threatened legal action against interviewer and publisher, commenting that ‘what I said is my copyright and the use of the words was prohibited by me except in so far as I approved it’.⁶ A N Wilson’s subsequent letter of apology to Lord Denning, published in *The Spectator* in December 1990, revealed that the material sent to Denning for approval prior to publication had – through Wilson’s apparent oversight – not included the remarks about the Guildford Four.⁷

Until the passage of the Copyright, Designs and Patents Act 1988, doubt existed as to the existence of copyright in the spoken word in the United Kingdom. Before the first general

social links with Libyan officials at a time when Libya was regarded as a terrorist threat to the United Kingdom.

³ See *The Spectator*, 18 August 1990, 8-10 (‘England, his England’).

⁴ See an Apology to the Guildford Four from Lord Denning, *The Spectator*, its then-editor Dominic Lawson, and A N Wilson at page 9 of the issue for 25 August 1990.

⁵ *Express Newspapers plc v News (UK) Ltd* [1990] FSR 359. See further below, text between notes 125-134.

⁶ See *The Times*, 10 September 1990.

Copyright Act in the United Kingdom, passed in 1911, statutory protection reached only certain types of work, generally not including the purely oral, although the Lectures Copyright Act 1835 did protect a limited class of lectures from unauthorised printing and publication.⁸ A more general proprietary right also existed at common law to prevent publication of a lecture or speech until the speaker had communicated it to the public.⁹ The Copyright Act 1911 gave up the restrictions on protection under the 1835 Act, defined 'lecture' as including 'address, speech and sermon', and also added 'political speeches' to the list of protected works.¹⁰ But the next general statute, the Copyright Act 1956, dropped this language altogether, creating significant uncertainty on the whole subject of oral productions,¹¹ and in 1977 the Whitford Committee on the reform of copyright law recommended explicit new legislative provision for the removal of doubt.¹²

The 1988 Act, which gave effect to this recommendation, confers copyright on four main categories of author work - literary, dramatic, musical and artistic.¹³ A literary work is defined as any work other than a dramatic or musical work, which is written, spoken or sung.¹⁴ It seems clear, therefore, that spoken words are capable of constituting a literary work even when they are unscripted, extempore or produced in conversation.¹⁵ This does not mean that any and all speech attracts copyright. There must be enough content to form an original work, and the words must

⁷ The Spectator, 22/29 December 1990, 54.

⁸ For the background to the 1835 Act (5 & 6 Will IV c. 65), see C. Seville, *Literary Copyright Reform in Early Victorian England: the Framing of the 1842 Copyright Act* (Cambridge: Cambridge University Press, 1999), 42-44, 54-57; and see *ibid*, 253-254, for an unsuccessful attempt to extend it to sermons. The Act, which is discussed in *Caird v Sime* (above), was repealed by the Copyright Act 1911 (see Sched 2).

⁹ *Caird v Sime* (1887) LR 12 App Cas 326; (1887) 14 R (HL) 37.

¹⁰ See Copyright Act 1911, ss 1(2), (3), 2(1)(v) (lectures), 20 (political speeches) and 35(1) (definition of 'lecture').

¹¹ See e.g. A. Ward, *A Manual of Sound Archive Administration* (Aldershot: Gower, 1990), at 48: 'Many oral history practitioners imagined that their informants enjoyed copyright in their recorded words under the 1956 Act, but broadcasters never assumed this, and the BBC for instance was not obliged to seek the permission of interviewees for the inclusion of their speech in programmes.'

¹² Committee to consider the Law on Copyright and Designs: Chairman The Honourable Mr Justice Whitford, Report Cmnd 6732 (1977), paras 590, 609(viii).

¹³ Copyright, Designs and Patents Act 1988 [henceforth 'CDPA 1988'], ss 3-4.

¹⁴ *Ibid*, s 3(1).

¹⁵ Note also CDPA 1988, s 58 (discussed further below, text between notes 160-162), which clearly assumes

also be recorded or fixed in some material form before any copyright will come into existence.¹⁶

Each of these requirements thus needs elaboration in the context of protecting speech, while the rules about fixation also have slightly curious consequences. All this will be discussed in more detail later in this article, along with the limitations of the scope of the copyright thus conferred arising from the rights of others, in particular the fair dealing provisions of the copyright legislation.

Two other brief introductory points may be made about the copyright protection of the spoken word, to help define the scope of this article. First, the producers of sound recordings enjoy copyright in their product quite apart from any copyright that may exist for the author (if any) of the material recorded. But this article is concerned with the copyright in the message rather than the medium. Second, the article does not treat of performance rights, under which performers may enjoy protection against unauthorised recording of their live performances and have the power to prevent commercialisation of such recordings.¹⁷ Performances include dramatic performances and readings and recitations of literary works; so the concept seems generally to envisage the prior existence of a work which is then performed, whereas our concern is with the content of unscripted, impromptu and extemporary speech. It would be possible, however, on the arguments of this paper, for extemporary speech to be a literary work as well as a performance – for example, the product of an ad-libbing stand-up comedian.¹⁸ Although performance rights are growing closer in substance to copyright in many ways, distinctions still require to be made; and this paper will be primarily concerned with speech which could not be called performance without stretching the word into near-meaninglessness.

copyright in the spoken word as distinct from copyright in the medium on which the speech has been recorded.

¹⁶ CDPA 1988, s 3(2); and see further below, text between notes 100-111.

¹⁷ See generally, W. R. Cornish and D. Llewelyn, *Intellectual Property: Patents, Trade Marks, Copyright and Allied Rights*, (London: Thomson/Sweet & Maxwell, 5th ed, 2003), ch. 13.30-13.40.

¹⁸ See H. Laddie, P. Prescott and M. Vitoria, *The Modern Law of Copyright*, (London: Butterworths/LexisNexis, 3rd ed, 2000), §§ 3.39-3.40. Another example is provided by *Gormley v EMI Records (Ireland) Ltd* [2000] 1 IR 74, discussed further below, text accompanying notes 29 and 90.

A Why oral copyright matters

B Interviews

As the Bordes, Ogilvie and Denning stories make clear, the existence of copyright in the spoken word raises important issues for journalists in print media and those who employ them. But the significance of the law in this area clearly stretches much further. For example, problems can arise from biographers' use of interviews with their subjects, whether conducted by themselves or by others. This is demonstrated by decided cases from North America, to be discussed further below, involving such diverse figures as the country music singer Shania Twain,¹⁹ the pianist Glenn Gould,²⁰ the composer Igor Stravinsky,²¹ and the novelist Ernest Hemingway.²² Not all such disputes have ended in litigation, however; in May 1997, for example, the Times reported a dispute over the use of interview material in the screenplay for a film dramatising the life of the artist Francis Bacon. But this must have been quickly settled, because the film in question, *Love is the Devil*, was released in July that year.²³

Another problematic context for oral copyright is provided by the broadcasting media, where interviews with both well-known people (politicians, sports-stars and other 'personalities') and the 'ordinary person in the street' form a major part of output. In February 2003 a TV documentary about the popular music star Michael Jackson, made by the well-known journalist

¹⁹ *Hager v ECW Press Ltd* [1999] 2 FC 287 (Reed J, Federal Court of Canada, Trial Division).

²⁰ *Posen et al (Gould Estate) v Stoddart Publishing Co* (1998) 161 DLR 4th 321 (Ontario CA).

²¹ *Craft v Kobler and Macmillan Inc* 667 F Supp 120 (1987).

²² *Estate of Ernest Hemingway v Random House Inc* 23 NY 2d 341; 244 NE 2d 250 (1968).

²³ *The Times*, 9 May 1997. For details of the film's release see <http://www.britfilms.com/britishfilms/catalogue/browse/?id=D5FD9B420eeaf2E8F7vQrWCEED61> (last visited 27 November 2004).

Martin Bashir, included many extracts from interviews between the pair, leading to an unfavourable portrayal of certain aspects of Jackson's conduct towards children. Jackson then initiated an action against Granada Television, seeking inter alia possession of unbroadcast tapes of other material on the basis of his copyright therein. The last news of the action at the time of writing was that the parties had agreed that the material would not be broadcast or otherwise released pending the outcome of the case.²⁴ Whether the copyright claimed (perhaps as the result of some contractual arrangement between Granada and Jackson) lay in the tapes as sound recordings, or related to the words of Jackson himself as recorded on the tapes, remained unclear.

B Public speech

Spontaneous speech which is not the result of interview also plays an important role in broadcasting - for example, commentary on a live event,²⁵ or speeches made by public figures - and is also capable of subsequent exploitation in various ways. An excellent example is provided by Martin Luther King's famous 'I have a dream' speech at the Lincoln Memorial in Washington DC on 28 August 1963, which became the subject of the case of *King v Mister Maestro and 20th Century-Fox Record Corporation*.²⁶ The defendants were marketing commercially and without Dr King's consent phonograph records of the speech, when King himself had plans to exploit the work in a similar way. His action to prevent the circulation of the defendants' phonographs, based on infringement of copyright, was successful. The example is imperfect in relation to the arguments of this article, since apparently a script of the speech was written in advance, mainly for press release purposes. But the release was only substantially in the form of the speech later

²⁴ See the BBC News Online website for 4, 25 and 28 February 2003 (last visited 27 November 2004):
http://news.bbc.co.uk/1/hi/entertainment/tv_and_radio/2719763.stm ;
http://news.bbc.co.uk/1/hi/entertainment/tv_and_radio/2795901.stm ;
http://news.bbc.co.uk/1/hi/entertainment/tv_and_radio/2807209.stm .

delivered so, at least to some extent, the story does demonstrate something of the power, in both content and delivery, and the continuing commercial value, which extempore speech may have.

B Oral history

Another group much affected by copyright in the spoken word, the one through which I first began to think about such issues, is oral historians, whose basic technique is the sound-recording of the memories and recollections of living people for purposes of preservation in archives and use by researchers as historical evidence. Generally these memories and recollections are elicited through interviews, which may be filmed or videoed as well as sound recorded.²⁷ The interests of oral historians overlap with those of broadcasters, since oral history interviews, often combined with archive film and sound material, can make for memorable and sometimes very moving programmes on television and radio. The interviews may therefore be exploited for both academic and commercial purposes. Digitisation of the archives held by both academic and broadcasting organisations to enable dissemination of the material on the Internet extends the scope of such exploitation still further.²⁸

As a result, however, oral historians and those who broadcast such material are increasingly asking themselves questions about the rights of their interviewees in the material which they record.

The typical oral history interviewee is very different from the public personality or celebrity

²⁵ Denied copyright, *obiter*, in *Canadian Admiral Corporation Ltd v Rediffusion Inc* 1954 ExCR 382, 393 (Cameron J).

²⁶ 224 F Supp 101 (1963).

²⁷ See further P. Thompson, *The Voice of the Past: Oral History*, (Oxford: Oxford University Press, 3rd ed, 2000).

²⁸ One could add here collectors of traditional music, songs, tales, ballads (such as 'The Ballad of True Thomas' quoted at the beginning of this article, which was first collected by Sir Walter Scott) and other aspects of the folk and oral tradition: see further *Robertson v Lewis* (1960) [1976] RPC 169. Note also *Foster v Mountford* [1978] FSR 582 (Supreme Court Northern Territory at Alice Springs), in which representatives of the local Pitjantjara people obtained an injunction to prevent the publication by an anthropologist of material of deep religious and cultural significance to the Pitjantjara, which had been disclosed to the defendant under conditions of secrecy 35 years prior

undergoing interview, inasmuch as the latter is generally attempting to convey not only information but also an image which will be of benefit to him, directly or indirectly, in shaping the way he and his activities are perceived by the public. By contrast, the oral history interviewee is usually much less sophisticated, being a genuinely private person talking about personal matters, perhaps revealing a considerable amount about herself, and possibly others with whom she has come in contact. An interviewer attempts to establish a conversational atmosphere in which the interviewee feels relaxed and confident, and the later publication of such material, whether in print, by broadcasting or commercial recording, or on the Internet, can sometimes seem morally inconsistent with the way in which it was obtained.

The potential moral difficulties are not limited to oral history interviews and recordings, as may be illustrated with a case decided in 1998 by the Irish Supreme Court. The question there was whether copyright existed in a 6-year-old child's oral retelling of stories from the Bible, recorded in class in 1961 by her teacher after the latter had first told the story in a simple version to her pupils. The recordings had been rediscovered by a religious broadcaster in the 1990s, and published commercially, in a recording entitled 'Give up yer aul sins'.²⁹ The child, now an adult, had given no consent to, and received no reward from, this profitable exploitation of her efforts thirty years after the event. Had she been treated fairly or respectfully in this process? Recognition of a copyright in her words, with its concomitants of consent and the possibility of financial return, might go some way to achieving that fairness and respect.

B Private speech and conversations

to the publication in question. The action was based upon breach of confidence.

²⁹ *Gormley v EMI Records (Ireland) Ltd* [2000] 1 IR 74. See also *The Times*, 16 September 1997, reporting the sale to EMI of a tape made at a church fete in 1957 by a policeman in Liverpool, recording the 16-year-old John Lennon singing Elvis Presley's 'Let's play house' and Lonnie Donegan's 'Puttin' on the style'. EMI paid £78,500 for the

A final context in which oral copyright might have a useful function is the protection of individual privacy. As a right to stop people making or reproducing copies of work without the author's consent, copyright is the basis upon which authors, artists and composers are paid for their work; but its role is not limited to the support of markets in creativity. Aspects of the law, such as the lengthy period of protection (far exceeding anything which might be thought necessary to provide merely economic incentives to create),³⁰ and the moral rights of authors to be identified as such and to have the integrity of their works respected,³¹ show that other considerations have been taken into account in its development. The 1988 Act already recognises a moral right to privacy in relation to photographs and films commissioned for private and domestic purposes, meaning that they may not be published, exhibited or broadcast without the commissioner's consent.³² The principle informing this provision, it is suggested, should also underpin understanding and application of copyright in other contexts, of which speech is one, at least in some circumstances.

An interviewee's consent to the interviewer's use of the material obtained through the interview does seem implicit in the relationship of the parties, although, as the example of Lord Denning's encounter with A N Wilson shows, issues may still arise about to what exactly consent has been given. Another example may be provided by the broadcasting in the USA in March 2004 of recordings of the late Princess Diana talking about her life as a member of the Royal Family which had previously been used, apparently with the Princess' consent, as a source for Andrew Morton's *Diana: Her True Story*, first published in 1992 (the phrase 'in her own words' was added to the title in later editions of the book). The tapes were said to have been recorded by a

tape, which however it proposed to keep in its archives rather than to release and exploit commercially.

³⁰ CDPA 1988, s 12.

³¹ CDPA 1988, ss 77-89.

³² CDPA 1988, s 85.

‘professional’ associate of the princess, but the extent to which their subsequent publication was actually authorised by the Princess, and indeed her overall copyright position on them, remains unclear.³³

There are also numerous examples of the publication of unauthorised recordings of speech not resulting from interviews, where the recordings were the result of eavesdropping by electronic means. Most notorious are the so-called ‘Squidgygate’ and ‘Camillagate’ affairs in 1992, in which private telephone conversations between, respectively, Princess Diana and her friend James Gilbey, and Prince Charles and his friend Camilla Parker Bowles, were surreptitiously recorded and then made available to the public through the media, both in audio and printed form. No consent had been sought from the speakers in the conversations recorded, but if their words had copyright, then the unauthorised publications in the media would have been *prima facie* infringements and actionable accordingly.³⁴

The tapping of telephones and other forms of electronic eavesdropping have long been recognised as potentially infringements of Article 8 of the European Convention on Human Rights (ECHR), which states that ‘everyone has the right to respect for his private and family life, his home and his correspondence’.³⁵ The generality of this is limited by the Article, to allow activities directed to national security, the prevention of crime, and the protection of the rights of others, notably those under Article 10 ECHR (freedom of expression). In the United Kingdom interception of communications through telecommunications systems is now subject to the

³³ See BBC News Online, 5 March 2004 (<http://news.bbc.co.uk/1/hi/world/americas/3531997.stm>, (last visited 27 November 2004).

³⁴ Transcripts of both conversations continue to be available on the Internet.

³⁵ See R. Clayton and H. Tomlinson, *The Law of Human Rights* (Oxford: Oxford University Press, 2000), paras 12.64-12.70A, 12.105.

Regulation of Investigatory Powers Acts,³⁶ but this leaves open the question of disclosing and reproducing copies of the products of such interceptions. Such conduct has been held to be the tort of breach of confidence;³⁷ but arguably one of the elements of that tort, a relationship of confidence between the eavesdropper and the speaker, is missing in many such cases,³⁸ and the scope of protection consequently remains unclear.

Outside the field of positive law, until 1 June 2004 Article 8 of the Press Complaints Commission's Code of Practice stated, under the heading, 'Listening Devices': 'Journalists must not obtain or publish material obtained by using clandestine listening devices or by intercepting private telephone conversations.'³⁹ Under the revised Code effective from 1 June 2004, Article 10 is headed 'Clandestine devices or subterfuge', and provides that 'The press must not seek to obtain or publish material acquired by using ... clandestine listening devices'. In June 2003 the Press Complaints Commission dealt with a complaint about publication in The Sun newspaper of transcripts of telephone conversations between Mr Peter Foster and his mother. In finding against The Sun, the Commission took as its 'premise that eavesdropping into private telephone conversations – and then publishing transcripts of them – is one of the most serious forms of physical intrusion into privacy'.⁴⁰ The publication of Foster's family conversation was not justified

³⁶ Regulation of Investigatory Powers Act 2000; Regulation of Investigatory Powers (Scotland) Act 2000.

³⁷ *Francome v Mirror Group* [1984] 2 All ER 208 (CA).

³⁸ *Malone v Commissioner of Police* [1979] 2 All ER 620 at 645-6 per Megarry J. Note however that in *Campbell v MGN Ltd* [2004] 2 WLR 1232 (HL) the requirement of a relationship of confidence has been much reduced in significance.

³⁹ For the text see <http://www.pcc.org.uk/cop/cop.asp> (last visited 27 November 2004). See also paras 16-24 of the Broadcasting Standards Commission Code of Practice on Privacy and Fairness, which has been adopted by Ofcom, the regulator replacing the Commission from 1 January 2004 (accessible at http://www.ofcom.org.uk/codes_guidelines/broadcasting/tv/bsc_codes/bsc_fcode.pdf) (last visited 27 November 2004).

⁴⁰ <http://www.pcc.org.uk/reports/details.asp?id=349> (last visited 27 November 2004). Note also the recommendation of the House of Commons Culture, Media and Sport Committee: 'The Code's ban on intercepting telephone calls should be updated to reflect the communications revolution (in line with the provisions of the Regulation of Investigatory Powers Act 2000) and should include reference to the privacy of people's correspondence by e-mail and between mobile devices other than telephones' (Fifth Report, Privacy and Media Intrusion (House of Commons 458-I, June 2003), para 63(i)). This recommendation was accepted by the

by the fact that he was a central figure in the so-called ‘Cheriegate’ affair current at the time of publication.⁴¹ No consideration was given to the possibility that there had been an infringement of copyright.

B Privacy and copyright

In *Wainwright v Home Office*,⁴² the House of Lords held that, at least prior to the coming into force of the Human Rights Act 1998 and the consequent domestication of the ECHR, English law knew no general right of privacy.⁴³ Instead privacy was protected only in specific areas, to be developed incrementally if at all, by both statute and the common law. In the post-ECHR case of *Campbell v MGN Ltd*,⁴⁴ the House developed the law of confidential information the better to protect privacy in accordance with Article 8 ECHR, but recognised that this would not capture all cases in which privacy was in issue – for example, in the strip-searching which was the subject of the *Wainwright* case. To recognise a role for copyright in the protection of privacy seems perfectly consistent with the Law Lords’ piecemeal approach to the topic, although the possibility has not hitherto received much attention in the debate about privacy laws.⁴⁵ It certainly seems clear that Article 8 ECHR could reinforce any development of the law of copyright to protect speech from unauthorised

Government in its response to the report (Cm 5985, October 2003, para 4.8), and implemented in article 10 of the new version of the Press Complaints Code (above, note 39).

⁴¹ Foster, an Australian with convictions for fraud and similar offences and who was fighting extradition from the UK, had assisted Cherie Blair, the Prime Minister’s wife, in the purchase of property in Bristol to be occupied by the Blairs’ eldest son, a student at Bristol University. Foster had been introduced to Mrs Blair by her ‘life-style adviser’, Carole Caplin, who was pregnant with Foster’s child at the time and subsequently miscarried. The story was briefly revived by the prospective publication of Foster’s memoirs, *A Question of Deceit*: The Times, 7 March 2004 (‘Conman Foster kicks PM in pants’).

⁴² [2003] 3 WLR 1137 (HL).

⁴³ On Scots law, see H L MacQueen, ‘Protecting privacy’, (2004) 8 *Edinburgh Law Review* 248 and 420.

⁴⁴ [2004] 2 WLR 1232.

⁴⁵ There is only the briefest of references to copyright by Committee on Privacy and Related Matters: Chairman David Calcutt QC: Report Cm 1102 (1990) (see chapter 9), and none at all in Calcutt’s subsequent Review of Press Self-Regulation (1993), or the National Heritage Committee’s Fourth Report, Privacy and Media Intrusion (House of Commons, March 1993), or the Culture, Media and Sport Committee’s Fifth Report, Privacy and Media Intrusion, or the Government’s response thereto (above, note 40).

reproduction and dissemination, with effect being given to the Article's self-imposed limitations through the exceptions to copyright, which may be generically described as fair dealing and public interest defences.⁴⁶

A Difficulties about protection of speech by copyright

B Concept of 'literary work'

Copyright is given to 'literary works'. The Berne Convention states in Article 2(1) that every production in the literary, scientific and artistic domain is covered by copyright, whatever might be the mode or form of its expression, and gives a non-exhaustive list of examples which includes such basically oral works as 'lectures, addresses, sermons'. As Sam Ricketson notes, however, these are 'only spoken works of a more formal or considered kind delivered before or to an audience', and the Convention therefore does not require protection for 'more aleatory or spontaneous forms of oral expression', although 'it is open to member countries to extend protection to these kinds of work if they wish'.⁴⁷ It would appear from the French, German and Dutch legislation that the protection of oral works as such in these countries is confined to the formal production of the kind mentioned in Berne.⁴⁸ However, in the UK the specific protection of lectures, speeches and sermons was dropped in 1956,⁴⁹ and nothing in the 1988 Act limits the protection of speech to such set-pieces. Further, the question of whether a work is 'literary' is determined 'irrespective of ..

⁴⁶ See further below, text accompanying notes 154-162. For the relationship of copyright and the ECHR more generally, see *Ashdown v Telegraph Group* [2002] Ch 149.

⁴⁷ S Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (London: Kluwer, 1987), ch. 6.15.

⁴⁸ Law No. 92-597 of July 1, 1992, on the Intellectual Property Code, Art. L. 112-2(2) (France); Law on Copyright and Neighbouring Rights (Copyright Law) (Text of September 9, 1965, as last amended by the Law of July 16, 1998) § 2(1)(1) (Germany); Copyright Act 1912 (as amended), Article 10(iii) (Netherlands).

⁴⁹ See above, text accompanying note 11.

whether the quality or style is high'.⁵⁰ The adjective 'literary' means simply that a work should consist of words or writing which convey information or instruction, or give enjoyment in the form of literary pleasure.⁵¹

However, the most obvious objection to copyright in the extempore spoken word is its frequent lack of form and substance, somewhat akin to the difficulties which have led the courts to deny copyright to single words,⁵² book and film titles,⁵³ catch phrases,⁵⁴ newspaper headlines,⁵⁵ and word processing menu commands.⁵⁶ With conversation or dialogue between two or more people, further issues may arise from a lack of 'distinct, identifiable boundaries' ⁵⁷ between the various contributions. In a context not involving speech, Canadian judges have argued that a work is something which generally is whole, complete or able to stand on its own, and that 'if a production is dependent upon surrounding materials such that it is rendered meaningless or its utility largely disappears when taken apart from the context in which it is disseminated, then that component will instead be merely a part of a work'.⁵⁸ Such considerations may well mean that individual questions and answers, or comments and responses, in an interview or a conversation, cannot enjoy copyright, since each of the contributions may be difficult or even impossible to understand without the other statements involved in the exchange.

⁵⁰ *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601, 608 per Peterson J.

⁵¹ *Exxon Corporation v Exxon Insurance Consultants International Ltd* [1982] Ch 119.

⁵² *Exxon Corporation v Exxon Insurance Consultants International Ltd* [1982] Ch 119.

⁵³ *Rose v Information Services Ltd* [1987] FSR 254; *Kirk v Fleming* (1929) MacG Cop Cas [1928-1935] 44.

⁵⁴ *Green v Broadcasting Corporation of New Zealand* [1989] 2 All ER 1056 (PC).

⁵⁵ *Cf Shetland Times v Wills* 1997 SC 316.

⁵⁶ *Data Access Corporation v Powerflex Services Pty Ltd* (2000) 202 CLR 1.

⁵⁷ *Estate of Hemingway v Random House Inc* 23 NY 2d 341, 347 (1968), per Fuld CJ.

⁵⁸ *CCH Canadian Ltd v Law Society of Upper Canada* [2002] 4 FC 213 (CA) at 260 (para 66) per Linden JA. See also *ibid* at 308 (paras 197-199) per Rothstein JA. The context is the copyright in the different parts of a law report. The conclusion that some parts as well as the whole of a law report might enjoy copyright was upheld by the Supreme Court of Canada, which did not find it necessary, however, to dwell on the meaning of 'work' in this context: see *Law Society of Upper Canada v CCH Canadian Ltd* [2004] SCC 13. See also *Sweeney v MacMillan Publishers Ltd* [2002] RPC 35, summarised below, note 121.

But this is not always true. As the cases from different jurisdictions to be discussed later in this article will show, judges have been prepared to accept that, viewed as a whole, such dialogues can give rise to copyright works, and also that particular quotations from the larger whole of the dialogue can have meaning even taken in isolation, which is what made the act of quotation worthwhile in the first place. Even where the components of a dialogue in themselves lack the quality of a work, there is also relevant force in an observation of Lord Reid in the classic case of *Ladbroke (Football) Ltd v William Hill (Football) Ltd*: ‘To my mind it does not follow that, because the fragments taken separately would not be copyright, therefore the whole cannot be.’⁵⁹ Thereafter in arguments about infringement the issue is not whether the component taken would have copyright in its own right, but is rather whether that component is a substantial part of a larger, copyright, work.⁶⁰

The problems of recognising when spoken words mature into works protected by copyright have not yet been addressed by courts in the United Kingdom. But in the American case of *Estate of Hemingway v Random House Inc*⁶¹ Ernest Hemingway’s widow and estate claimed that his common law copyright in unpublished material – that is to say, copyright at the level of State law so far as not pre-empted by the federal statute on the subject, which at the time did not recognise copyright in such material – had been infringed by the publication in 1966 of a posthumous biography (*Papa Hemingway: a personal memoir*) by his close friend, A E Hotchner. The work was constructed around conversations with Hemingway, mostly as carefully noted shortly after they occurred, but in some cases from tape recordings. As the court put it: ‘Woven through the narrative, and giving the book much of its interest and character, are lengthy quotations from

⁵⁹ [1964] 1 WLR 273 at 276; to like effect, Lord Hodson at 285, Lord Devlin at 290, and Lord Pearce at 293. The context is the component parts of a football pools coupon.

⁶⁰ See also *Law Society of Upper Canada v CCH Canadian Ltd* [2004] SCC 13.

⁶¹ 23 NY 2d 341 (1968, New York Court of Appeals).

Hemingway's talk, as noted or remembered by Hotchner.⁶² During Hemingway's lifetime, Hotchner had published articles using such material in the same way, and Hemingway had approved of this practice. The estate argued that Hemingway's 'directly quoted comment, anecdote and opinion were his 'literary creations', his 'literary property', and that the defendant Hotchner's note-taking only performed the mechanics of recordation'.⁶³

The New York Court of Appeals noted a number of problems with the concept of copyright in conversational speech, including 'the difficulty of measuring the relative self-sufficiency of any one party's contribution to a conversation'.⁶⁴ But, said the Court of Appeals,

speech is now easily captured by electronic devices and, consequently, we should be wary about excluding all possibility of protecting a speaker's right to decide when his words, uttered in private dialogue, may or may not be published at large. Conceivably, there may be limited and special situations in which an interlocutor brings forth oral statements from another party which both understand to be the unique intellectual product of the principal speaker, a product which would qualify for common-law copyright if such statements were in writing.⁶⁵

The court drew no specific conclusion on the facts before it, but instead went on to hold that Hemingway's conduct with regard to Hotchner's publications in his lifetime showed that authority to publish must be implied, so negating the reservation of any common law copyright. The court said:

⁶² Ibid at 344.

⁶³ Ibid at 345.

⁶⁴ Ibid at 347.

⁶⁵ Ibid at 348.

Assuming, without deciding, that in a proper case a common-law copyright in certain limited kinds of spoken dialogue might be recognized, it would, at the very least, be required that the speaker indicate that he intended to mark off the utterance in question from the ordinary stream of speech, that he meant to adopt it as a unique statement and that he wished to exercise control over its publication ... Such an indication is, of course, possible in the case of speech. It might, for example, be found in prefatory words or inferred from the circumstances in which the dialogue takes place. Another way of formulating such a rule might be to say that, although, in the case of most intellectual products, the courts are reluctant to find that an author has 'published', so as to lose his common-law copyright, ... in the case of conversational speech – because of its unique nature – there should be a presumption that the speaker has not reserved any common-law rights unless the contrary strongly appears.⁶⁶

Nimmer on Copyright, the standard work on US law, is critical of the tests proposed in *Henigway* for the identification of an oral work protectable by copyright.⁶⁷

It is most unfortunate to introduce the concept that only a 'unique intellectual product' may command common law copyright protection. This suggests a standard of creativity, or of novelty, or of both, that is contrary to prevailing copyright standards, and that has no greater justification in oral than it does in written works. Further, to require that the speaker 'indicate' that he claims copyright in his expression is to create the need for a kind of oral copyright notice that is difficult to justify. A commendable aspect of common law

⁶⁶ Ibid at 349-350.

⁶⁷ M. B. Nimmer and D. Nimmer, *Nimmer on Copyright*, filed through Release No 60, April 2003, § 2.02.

copyright has been that it, like copyright systems throughout the rest of the world, and unlike statutory copyright within the United States, requires no formality.

In *Harper & Row v Nation Enterprises*,⁶⁸ the Court of Appeals for the Second Circuit held that verbatim words used in interviews by ex-President Gerald Ford were copyrightable, despite an observation that ‘it pushes language beyond its common sense bounds to characterize Ford’s conversational words as ‘a work prepared’ by him’.⁶⁹ Such difficulties were, however, too great for the District Court of Virginia in *Falwell v Penthouse International Ltd*,⁷⁰ where the Reverend Jerry Falwell sued the *Penthouse* magazine for infringement of common law copyright by publishing an interview with him without his consent. The claim was rejected by a court which feared inundation with ‘claims from celebrities and public figures all of whom may argue that their expressions should also be afforded the extraordinary protection of copyright’,⁷¹ and added:

However different or unique plaintiff’s thoughts or opinions may be, the expression of these opinions or thoughts is too general and abstract to rise to the level of a literary or intellectual creation that may enjoy the protection of copyright. Although the general subject matter of the interview may have been outlined in the reporters’ minds prior to their meeting with plaintiff, the actual dialogue, including the unprepared responses of plaintiff, was spontaneous and proceeded in a question and answer format. There is no defined segregation, either by design or implication, of any of plaintiff’s expression of his thoughts and opinions on the subjects discussed which would aid in identifying plaintiff’s

⁶⁸ 723 F 2d 195 (1983).

⁶⁹ 723 F 2d at 206.

⁷⁰ 521 F Supp 1204 (1981).

⁷¹ *Ibid*, at 1207. Note the comment of Nimmer, § 2.02, note 37.1: ‘The fear thus expressed is, to say the least, exaggerated. Celebrities are not likely generally to object to the public reporting of their statements, and, in any event, the usual brief quotations would, in most cases, not constitute copyright infringement. ... Where an extensive interview is quoted, it is likely that the speaker previously consented to the publication of the interview.’

purported copyright material.⁷²

Once again, however, Nimmer is critical of the tests applied: 'if the response had been reduced by the speaker to writing, there can be no doubt that the result would have commanded statutory copyright protection, without the need to pass any qualitative test as to the 'literary' or 'intellectual' content.'⁷³

Hesitations like those of the US courts are also apparent in Canadian cases. In respect of oral works the relevant provisions of the Canadian Copyright Act remain very similar to those of the British Copyright Act 1911, despite substantial changes to the legislation in other respects in 1985 and 1997.⁷⁴ In the Ontario case of *Gould Estate v Stoddart Publishing Co*,⁷⁵ the estate claimed copyright in the oral conversations which took place in 1956 between Glenn Gould, the well-known concert pianist and an intensely private individual, and Michael Carroll, who tape recorded them at the time with Gould's consent, and published them in a book in 1995, twelve years after Gould's death. The claim was rejected at first instance by Lederman J:

A person's oral statements in a speech, interview or conversation are not recognized in that form as literary creations and do not attract copyright protection ... [T]he nature of the interview, conducted in informal settings – at an empty Massey hall, at the home of Gould's mother and on vacation in the Bahamas – was such that it was intended to be casual, to catch the spontaneity of Gould when he was relaxing. The conversation between the two men was the kind that Gould would have with a friend. Indeed Gould and Carroll

⁷² 521 F Supp at 1208. See further below, text accompanying notes 88 and 152.

⁷³ Nimmer, § 2.02, note 37.1

⁷⁴ See generally D. Vaver, *Essentials of Canadian Law: Copyright Law* (Toronto: Carswell, 2000), 33-34. For the 1911 Act, see above, text accompanying note 10.

remained friends for a short while afterwards. Gould was not delivering a structured lecture or dictating to Carroll. Rather, Carroll engaged Gould in easygoing conversation out of which emerged comments which provided insights into Gould's character and personal life. Gould was making offhand comments ... This is not the kind of discourse which the Copyright Act intended to protect.⁷⁶

But the Ontario Court of Appeal, while agreeing with the conclusion that Gould had no copyright – 'it is evident from this record that Gould did not have a copyright with respect to his oral utterances or in the 'transcriptions' of them'⁷⁷ – went on to hold that the interviewer Carroll had a copyright in his record of his dialogue with Gould: 'Carroll as the author of the text and captions in the book was the owner of the copyright in the very written material the appellants are attempting to suppress. ... The person who makes notes or report of the speech is the author of the report and obtains copyright in the report.'⁷⁸ And this approach was followed by Reed J in the Federal Court of Canada in *Hager v ECW Press Ltd*,⁷⁹ a case concerned with the copying of quotations from the country singer Shania Twain, first obtained in an interview with, and then published by, Barbara Hager, from whose book the defendant reproduced them in his own later biography of Twain. Hager was found to have a copyright which the defendant had infringed.

The issues of authorship and ownership in relation to recorded and published quotations raised in these cases will be discussed later in this article.⁸⁰ At the present stage of the argument, the significance of *Gould Estate* and *Hager* is that both ultimately recognise the possibility that an interview may give rise to a literary work capable of attracting copyright, albeit only for the person

⁷⁵ (1997) 74 CPR (3d) 206; aff'd (1998) 161 DLR 4th 321 (Ontario CA).

⁷⁶ (1997) 74 CPR (3d) at 217.

⁷⁷ (1998) 161 DLR (4th) at 329-30 (at para. 23).

⁷⁸ Ibid at 330 (at para. 23).

recording or fixing the whole interview in writing. But Lederman J's statement in *Gould Estates* that 'A person's oral statements in a speech, interview or conversation are not recognized in that form as literary creations' is not upheld by the Court of Appeal, and was not in any event supported by the citation given, which was to the old English House of Lords decision, *Walter v Lane*.⁸¹ That case concerned the copyright in verbatim reports in *The Times* newspaper of five public speeches made by Lord Rosebery, but, as will again be discussed in more detail later in this article,⁸² the claim to copyright was made, not by the speech-maker, but by *The Times*. Indeed, Lord Rosebery was not involved in the case, and his rights, if any, were carefully excluded from consideration by the majority of the court. It is true that Lord Davey remarked: 'There is no copyright in a speech although delivered on a public occasion',⁸³ while Lord Brampton said: 'if no reporters had been present, or if though present none had taken down his Lordship's utterances, those utterances would have remained unrecorded, and no question of copyright could have arisen, for there would have been no subject of copyright in existence.'⁸⁴ The context of these comments, however, is that the copyright legislation in force at the time (1900) conferred literary copyright only upon the authors of 'books', and copyright was the right to multiply copies of a published writing.⁸⁵ Apart from the *Lectures Copyright Act 1835* (which was inapplicable in this case), there was indeed no question of statutory copyright in a purely oral production as the law then stood in the United Kingdom. The possibility of 'common law copyright' in an unpublished work⁸⁶ was also precluded, since Lord Rosebery gave his speeches on public occasions in front of journalists, impliedly authorising further dissemination.

⁷⁹ [1999] 2 FC 287.

⁸⁰ See below, text accompanying notes 112-141.

⁸¹ [1900] AC 539 at 557-558, 559.

⁸² See below, text accompanying notes 122-123.

⁸³ [1900] AC at 550.

⁸⁴ *Ibid* at 557.

⁸⁵ *Literary Copyright Act 1842* (5 & 6 Vict, c 45), ss 2 and 3.

The bulk of the US cases referred to earlier also support the view that speech can give rise to copyright works. The case going against the proposition, *Falwell*, has been authoritatively criticised, and seems inconsistent with the other authorities as well as basic principles of copyright law. And even *Falwell* is not categorically opposed to oral copyright; as Nimmer points out,⁸⁷ the judgment does refer cautiously to undefined ‘narrow circumstances where a cause of action involving an oral expression can be sustained under a common law copyright theory’.⁸⁸

B Originality

To receive the protection of copyright under UK law, a literary work must be ‘original’. Just as the question of whether a work is ‘literary’ is determined irrespective of quality or style,⁸⁹ so the test of originality rejects any efforts to measure the quality or merit of a work before it can be protected, and depends most on a minimal level of independent (that is, not copied) skill and labour by the author of the work. While the routine words and catch phrases with which we navigate our way through daily life may well fall short of even such low standards of originality and literariness, a middle ground between such commonplaces and the full-blown lecture or speech can none the less be recognised, and it is here, it is suggested, that material emerging from interviews, commentaries and other impromptu and unscripted speech can often be located as original copyright works.

The issues involved here have again not received treatment in the British courts, but some of the difficulties which may be encountered come through in the Irish case of *Gormley v EMI Records (Ireland) Ltd*,⁹⁰ where the Supreme Court was applying legislation identical, at all relevant points, to the British Copyright Act 1956. The court’s rejection of the claim to copyright was

⁸⁶ See above, text accompanying note 9.

⁸⁷ § 2.02, note 37.1.

⁸⁸ 521 F Supp at 1208.

⁸⁹ *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601, 608, per Peterson J.

founded, not only on the lack of an immediately comprehensible material form for the work, but also on a finding that the girl's version of her story was not original in the sense required by copyright. She had been treating a story already in existence, and was trying, not to produce a new form of expressing the story, but to show that she knew it by faithfully reproducing what she had been told by her teacher (who had skilfully 'translated' difficult words and concepts such as 'ascension', 'resurrection' and 'Holy Ghost' to be comprehensible to very small children). The charm of the girl's Dublin accent – in particular, the way she pronounced the word 'certainly' – and her reference to Judas Iscariot as 'that dirty auld squealer' were not enough to give her work originality. She had copied what she had been told, and the manner of telling it, even though she had put the story in her own language. While a 6-year-old could exercise the independent thought, skill and labour needed to obtain a copyright, it was doubtful whether this would happen when her sole purpose was to repeat her teacher's story.

But, as already noted, the result of the *Gormley* case seems hard in failing to recognise the degree to which an individual had been capitalised upon by others without her consent or any reward, and further return to the classic English judicial statement on the meaning of originality leaves doubts as to the approach of the Irish court, at least from a United Kingdom perspective:

The word 'original' does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought ... the Act does not require that the expression must be in original or novel form, but that the work must not be copied from another work – that it should originate from the author.⁹¹

⁹⁰ [2000] 1 IR 74.

⁹¹ [1916] 2 Ch at 608.

The fact that, as the Irish court indicated, the girl in Gormley had put the stories told by her teacher into her own words should, it is suggested, have sufficed to meet the requirement of originality.

In the United States the standard of ‘originality’ was raised by the Supreme Court in *Feist v Rural Telephone Service Company Inc*⁹² in 1991, post-dating most of the oral copyright cases already cited, although, importantly, not Nimmer’s criticism of those cases for setting over-high standards of quality before oral works may enjoy copyright. Nimmer’s comments suggest that Feist’s recasting of the originality requirement, from a ‘sweat of the brow’ test to one of ‘spark of creativity’, should not be seen as supporting some minimum level of quality which most informal speech is likely to fall beneath. Feist was a case about the copyright in a telephone directory, in which it was held that the effort and resource needed to put together a list of subscribers to a telephone service and their addresses and numbers did not merit the protection of copyright, since arranging their surnames in alphabetical order lacked the minimum degree of creativity needed to constitute originality. But Feist must be seen in the context of its own facts, namely the protection of a compilation or database. In this context, what copyright protects is, in the language of the Berne Convention, the ‘selection and arrangement’ of the contents of the work, and since all subscribers were included in the directory, and alphabetical listing was the only possible usable way of presenting the results, the originality of the selection and arrangement was indeed negligible.⁹³ Impromptu speech involving any degree of consideration or reflection by the speaker is almost certain to involve more originality than was apparent in the Feist case.

The decision equivalent to Feist in Canada is *Tele-Direct (Publications) Inc v American Business*

⁹² 499 US 340 (1991).

⁹³ See further, for discussion of the limited scope given Feist in subsequent cases, in Nimmer, § 3.04[B][2].

Information.⁹⁴ The case concerned the yellow pages section of a telephone directory, and again it was held that there was insufficient originality for copyright. But later the Hager court confined Tele-Direct to the compilation/database area, saying that difficulties arose there 'because such works are not likely to exhibit, on their face, indicia of the author's personal style or manner of expression'.⁹⁵ Tele-Direct has also been the subject of criticism by the Federal Court of Appeal in *CCH Canadian Ltd v Law Society of Upper Canada*,⁹⁶ while on appeal the Supreme Court took up a mid-position, emphasising that originality lay, not in either labour and 'sweat of the brow' or 'sparks of creativity', but in the author's exercise of skill and judgement.⁹⁷

There has been no decision in the United Kingdom directly equivalent to *Feist*, although in the artistic copyright case of *Interlego v Tyco*⁹⁸ the Privy Council held that skill and labour were not always enough for originality. Once more, however, context was important: the case was about artistic works, and the court took the example of tracing another's drawing to illustrate the case where there might be skill and labour but none the less no originality, and hence no copyright in the resulting work. The conclusion was that, since the 'third generation' Lego brick looked the same as its predecessors, no new artistic copyright came into existence, although the designers had put a great deal of skill and labour into non-visual aspects of the new brick such as its durability and flexibility. The case therefore does not say that skill and labour are insufficient for originality; rather, what is needed is relevant skill and labour. With regard to spoken works, there might well be skill and labour, but no new copyright, in simply repeating the words of another; but the situation with which this article is concerned is that of impromptu speech, whether in conversation with others or delivered as a monologue, and the modification of the skill and labour dimension of

⁹⁴ [1998] 2 FC 22 (CA); leave to appeal to SCC denied [1998] 1 SCR xv.

⁹⁵ [1999] 2 FC at 311 (para 42).

⁹⁶ [2002] 4 FC 213 (CA). See also Vaver, *Copyright Law*, 61-3.

⁹⁷ *Law Society of Upper Canada v CCH Canadian Ltd* [2004] SCC 13, paras 14-25, per McLachlin CJ.

originality found in the *Interlego* case simply seems to leave that situation unaffected.⁹⁹

B Fixation

The 1988 Act provides that copyright does not subsist in a literary, dramatic or musical work unless and until it is recorded in writing or otherwise.¹⁰⁰ This is clearly crucial for the copyright in unscripted speech. Only when some record is made (fixation) does copyright come into existence.

With literary, dramatic and musical works, the traditional form of record has been writing, whether in print or otherwise. But writing is not the only possible method of recording literary, dramatic and musical works, nor does the 1988 Act so limit its requirement.¹⁰¹ The electronic storage of work in digital form on discs and in computer memories is well known. So far as the spoken word goes, the tape and cassette recorder have been familiar for even longer, and film,¹⁰² video and digital recording, including voice recognition software, can be added to the list of methods of fixation sufficient to confer copyright on the work recorded. A further possibility might arise through lip reading what a speaker is saying on a film without a sound track.¹⁰³

The importance of the 1988 Act's departure from its 1956 predecessor's formulation of the requirement of fixation – 'reduced to writing or some other material form' – can be seen from the

⁹⁸ [1989] AC 217 (PC).

⁹⁹ Note that in the oral copyright case of *Express Newspapers v News UK Ltd* [1990] FSR 359 (discussed further below, text accompanying notes 125-134), Browne-Wilkinson VC at 366 thought *Interlego* dealt with a point on originality quite different from that in *Walter v Lane*.

¹⁰⁰ CDPA 1988 1988, s 3(2).

¹⁰¹ See Laddie Prescott and Vitoria, 3rd edn, §§ 3.33-3.36; Copinger and Skone James on Copyright, (London: Sweet & Maxwell, 14th edn, 1999), § 3.81.

¹⁰² On fixation of a dramatic work by recording it on film, see *Norowzian v Arks Ltd (No 2)* [1998] FSR 79 at 87-88, approved in the Court of Appeal [1999] FSR 363 at 367.

¹⁰³ A conversation recorded on CCTV in Inverness Prison and subsequently analysed by a forensic lipreader was part of the evidence used by police in investigating the part played by Nat Fraser in the murder of his wife Arlene, for which the former was convicted in January 2003; see the BBC News Scotland website for 30 January 2003 (<http://news.bbc.co.uk/1/hi/scotland/2707855.stm>, (last visited 27 November 2004). See also the English case about lip-readers as expert witnesses in criminal cases, *R v Luttrell, Dawson and Hamberger*, Court of Appeal Criminal Division 28 May 2004, *The Times* 9 June 2004.

decision of the Irish Supreme Court in *Gormley v EMI Records (Ireland) Ltd*,¹⁰⁴ the facts of which were summarised briefly above. The court rejected the claim to copyright by the schoolgirl whose oral version of a Bible story had been recorded by her teacher. The result purported to be driven by the language of the Irish Copyright Act 1963, which, like the 1956 Act in the United Kingdom, required literary works to be written or reduced to some other material form. Taking a very narrow approach, the court held that tape recording was not enough for this purpose. The symbol which comprised the notation of what was said had to be capable of being understood without more, and this was not true of a magnetic trace (even although such recording was admittedly indistinguishable in principle from taking down the speech in shorthand). The Irish legislation has since been amended to fall largely into line with the 1988 Act.¹⁰⁵

The requirement of recording (or ‘fixation’) still means, however, that there is no copyright in the unrecorded spoken word.¹⁰⁶ Since the copyright does not come into existence unless and until the recording is made, copyright confers no right on a speaker to stop people making recordings of what is said. If there is any right at all to prevent recording of one’s words, it must be sought in other branches of the law.¹⁰⁷ However, the 1988 Act expressly provides that, for the purposes of conferring copyright on a work by recording it, it is immaterial whether the work is recorded by or with the permission of the author, i.e. the speaker. Thus, while I may eavesdrop on and record other people’s telephone conversations without infringing copyright in what they say, as soon as the recording is made, the words have copyright and the subsequent reproduction and

¹⁰⁴ [2000] 1 IR 74.

¹⁰⁵ Copyright Act 2000 (Ireland), s 18(1): ‘Copyright shall not subsist in a literary, dramatic or musical work or an original database until that work is recorded in writing or otherwise by or with the consent of the author’ (emphasis supplied). The requirement of the author’s consent to the recording, which is not found in the UK Act, means that the unauthorised recorder can continue to over-ride the will of the author by reproducing and disseminating the recording without having to seek the latter’s consent – a curious outcome.

¹⁰⁶ For a full account of the history of the fixation requirement in the UK and the USA, see D. J. Brennan and A. F. Christie, ‘Spoken words and copyright subsistence in Anglo-American law’, [2000] IPQ 309.

¹⁰⁷ For example, the Regulation of Investigatory Powers Act 2000 or breach of confidence: see above, text

publication of these words elsewhere may be controlled by the speaker.

This analysis is obviously of some importance in the debate about the possible role of copyright in the legal protection of privacy referred to earlier. The unauthorised use or re-recording of another's recorded speech is an infringement of that other's copyright, entitling him to all the remedies which are available in respect of that civil wrong such as injunctions or interdicts to prevent the continuation of the wrong, damages for any losses caused to the victim, and accountings of profits in respect of any gains made by the wrongdoer. The Berne Convention states that it is for the national legislation of member states to prescribe whether in general works require fixation in some material form to be protected. It would therefore be quite possible for the United Kingdom, as a member of the Berne Convention interested in legislating to give more effective protection to individual privacy, to remove the requirement of recording, and adopt the position that all unscripted speech amounting to an original work had copyright from the moment it was uttered.¹⁰⁸ The oddity of the present position, where copyright in words arises from the chance of another's unauthorised intrusion, and the curious results which can follow, have been well explored elsewhere by Jeremy Phillips.¹⁰⁹ In some other European jurisdictions, as we have seen, there can be copyright even in the unrecorded spoken word (subject to the words amounting to a work such as a speech or lecture),¹¹⁰ while in the USA common law copyright may extend to unfixed oral works, the requirement of fixation under the Copyright Act of 1976 being one that State laws are not bound to follow.¹¹¹ Fixation, it is suggested, would be better seen as a matter of

accompanying notes 36-38.

¹⁰⁸ This is the position argued for by Brennan and Christie (above, note 106). The possibility of thus extending copyright does not appear to have been considered in the debates on the protection of privacy in the UK (above, text accompanying notes 30-46).

¹⁰⁹ See J. Phillips, 'Copyright in spoken words – some potential problems', [1989] 7 EIPR 231.

¹¹⁰ For example, France and the Netherlands provide for the existence of copyright in works regardless of the mode or form of expression (Intellectual Property Code 1992, Art. L. 112-1 (France); Copyright Act 1912 (as amended), Article 10 (Netherlands)). The German Copyright Act 1965 (as amended) contains no requirement of fixation.

¹¹¹ Nimmer, § 2.02; US Copyright Act, § § 102(a), 301.

evidence and proof of a work, rather than as a constitutive element of copyright itself.

B Authorship and ownership

In general, the author of a literary work is the first owner of the copyright in it, although if a literary work is created in the course of employment, copyright vests in the employer.¹¹² The author is the person who creates the work.¹¹³ At first sight, it seems clear that with extempore speech the creator is the speaker, who is therefore first owner of the copyright in the words. But there are some difficulties in respect of interviews, where the interviewee's words are stimulated by the interviewer's questions, and the two sides of the conversation may be difficult to understand independently of each other.

The 1988 Act recognises works of joint authorship, where a work is produced by the collaboration of two or more authors in which the contribution of each author to the work is not distinct from that of the others.¹¹⁴ Here copyright in the whole work is owned jointly by the authors. The essence of joint authorship is collaboration or cooperation between the authors in the execution of the work.¹¹⁵ But it has been held in cases that where one person supplies ideas and information and another puts these into literary form, it is the latter who is author and owner of the copyright.¹¹⁶ There may, however, be exceptional cases where the contribution of the person supplying material to the person actually executing the work is sufficient to allow a claim of copyright as either sole or joint author: that is to say, it goes beyond giving ideas to giving

¹¹² CDPA 1988 1988, s 11(1), (2).

¹¹³ *Ibid*, s 9(1).

¹¹⁴ *Ibid*, s 10(1).

¹¹⁵ *Cala Homes (South) v Alfred McAlpine Homes East* [1995] FSR 818 at 835. Cf *Beckingham v Hodgins* [2003] EMLR 18 (CA), holding that the existence of a common intention to produce a joint work was not a requirement for a work of joint authorship.

¹¹⁶ *Donoghue v Allied Newspapers* [1938] 1 Ch 106 (ghost writer); *Cummins v Bond* [1927] 1 Ch 167 (spiritualist medium); *Leah v Two Worlds Publishing Ltd* [1951] Ch 393 (spiritualist medium); *Robin Ray v Classic FM* [1998] FSR 622 (music cataloguer and client).

directions or instructions as to the mode of expression or execution.¹¹⁷ A straightforward example would be where she is dictating to an amanuensis, in which case she is plainly the sole author.¹¹⁸

David Vaver has suggested that ‘any substantial intellectual contribution to a work’s composition ... should, in principle, count as co-authorship’.¹¹⁹ US commentators have argued from a ‘common law copyright’ perspective that an interview gives rise to a joint copyright.¹²⁰ It is submitted, however, that in the UK, despite the intellectual symbiosis between the two sides of an interview or a conversation, what results is not a work of joint authorship under the 1988 Act’s definition, because the respective contributions remain distinguishable as a matter of fact. Nor can the whole copyright be attributed to the interviewer, who may rather be compared with the supplier of ideas and information which stimulate, rather than direct or control, a responsive expression from the interviewee. Indeed, the interviewer’s questions may be inspired by the interviewee’s responses to earlier ones. What emerges from an interview is at least two works, each having an independent copyright: the component parts on each side may or may not have copyright in their own right, but the lack of copyright in some or other bit of the contribution need not prevent the whole having protection.¹²¹ Each party is responsible for the expression of its own contribution, although undoubtedly the other’s participation is essential to the process by which that expression was achieved. Its significance, however, does not extend to determining the way in

¹¹⁷ See e.g. the decision of the Indian High Court in *Najma Heptulla v Orient Longman Ltd* [1989] FSR 598.

¹¹⁸ See for a valuable discussion of joint authorship in another context, D. Vaver, ‘Copyright in legal documents’, (1993) 31 *Osgoode Hall Law Journal* 661, especially at 666-667.

¹¹⁹ Vaver, *Copyright Law*, 76.

¹²⁰ A. S. Hirsch, ‘Copyrighting conversations: applying the 1976 Copyright Act to interviews’, [1982] 31 *American University LR* 1071. Cf Note, ‘Copyright: right to common law copyright in conversations of a decedent’, (1967) 67 *Columbia LR* 366; V. L. Ruhga, ‘Ownership of interviews: a theory for protection of quotations’, [1988] 67 *Nebraska LR* 675.

¹²¹ See the dicta in *Ladbroke (Football) Ltd v William Hill (Football) Ltd*, cited at note 59 above. Note also *Sweeney v MacMillan Publishers Ltd* [2002] *RPC* 35, where it was held that copyright subsisted in each chapter and perhaps each page or even sentence of James Joyce’s *Ulysses* as it was written, as well as in the overall work; but as each passage was incorporated into the larger work, copyright should be regarded as residing in that rather than in its constituent parts. Copyright also subsisted in Joyce’s fair copy manuscript, and in earlier drafts of the work, successive typescripts and proofs.

which each party decides to express what he wants to say. Ultimately creation lies in the mind and mouth of the speaker, and accordingly that person is the sole author of what she says for the purposes of copyright.

A difficulty for this argument may seem to lie in the decision of the House of Lords in *Walter v Lane*,¹²² as it has been interpreted in subsequent English and Canadian decisions. As already noted, *Walter v Lane* concerned the copyright in verbatim reports of five public speeches made by Lord Rosebery. The reports had been made by journalists and published in *The Times* newspaper. These reports had then been copied by the defendant without authorisation from *The Times*, in order to produce a book of Lord Rosebery's speeches. By a majority of 4-1, the House of Lords, reversing the Court of Appeal, held that *The Times* had a copyright, even though the words recorded in the reports were entirely derived from Lord Rosebery, and that it was infringed by the defendant's publication.

The majority were clearly moved by a sense that the defendant was seeking to reap where he had not sown. The fact that he had corrected *The Times* reports from Lord Rosebery's album of corrected cuttings of the reports of his speeches was not enough to escape liability (only one of the five speeches had actually been so adjusted in the defendant's book). Another important feature of the case is that Lord Rosebery himself made no claim, so that his rights (if any) were not considered in detail. Moreover, his words were not the product of any interview, but were rather speeches made on public occasions, apparently with many journalists present. As a result of this public character of the speeches, the House of Lords was clearly of the view that Lord Rosebery had authorised the verbatim reporting and dissemination of his words, and had given up the

¹²² [1900] AC 539.

common law right established in the earlier case of *Caird v Sime*¹²³ to prevent publication of a speech or lecture given on a private occasion.

The suggestion that *Walter v Lane* is no longer of authority, at least with regard to the reporter's copyright, because it was decided before the Copyright Act 1911 added a requirement of originality before a work could attract protection, has been rejected by English and Australian courts.¹²⁴ The case has come to have importance in the context of oral copyright as a result of cases about interviews. In England, *Express Newspapers plc v News (UK) Ltd*¹²⁵ is the litigation arising from the interviews with Pamella Bordes and Marina Ogilvy referred to at the beginning of this article. The Daily Express had carried the interview with Mrs Bordes, complete with verbatim quotations, as an exclusive story; later Today carried the same interview with the same quotations. The owners of the Daily Express sued the owners of Today for infringement of copyright. While the action was pending, Today published an interview with Miss Ogilvy, including verbatim quotations. The Daily Star, another newspaper in the Express Group, published the same story the following day, clearly deriving it from the Today interview and using the same quotations. The owners of Today then brought an action against the Express Group for infringement of copyright.

A crucial element in the case making *Walter v Lane* relevant was the use of the quotations, since it was held, quite rightly, that there was no copyright in a news story other than in the form of words used to report it. But the Vice-Chancellor, Sir Nicolas Browne-Wilkinson, held that *Walter v*

¹²³ (1887) LR 12 App Cas 326; (1887) 14 R (HL) 37.

¹²⁴ *Sands & McDougall v Robinson* (1917) 23 CLR 49; *Robertson v Lewis* [1976] RPC 169. Cf *Lipman v Commonwealth of Massachusetts* 475 F 2d 565 (1973), where the Court of Appeals for the First Circuit held that the transcriber of the Mary Jo Kopechne inquest did not have common law copyright in his transcript, on the grounds that verbatim reporting, however skilful, lacked the necessary originality, and *Walter v Lane* was distinguished on the basis that the then copyright statute had no such requirement. For an English case involving court transcripts, but in which no view is expressed as to their copyright status, see *Warwick Film Productions Ltd v Eisinger* [1969] 1 Ch 508 (trial of Oscar Wilde).

¹²⁵ [1990] FSR 359.

Lane conferred what he called a 'reporter's copyright' on one who transcribed and published another's words. The Vice-Chancellor obviously thought that the case for copyright was even stronger where the report was of remarks procured by interview, as in the case before him, than it was in *Walter v Lane*, involving as it did the mere transcription of another's speech:

The evidence does show that there was an interview lasting over eight and a half hours with Miss Ogilvy. The skills of the reporter in this case are quite different and much greater than those shown in the Lord Rosebery's speech case. It was not simply taking down the words of somebody who was already going public by speaking publicly. Although Miss Ogilvy has approached the reporter, the whole conduct of the interview and the selection of quotations involves at least as much (and in my view greater) skill and judgement than merely taking down the words of a speaker at a public speech.¹²⁶

However, the Vice-Chancellor equally clearly understood that the reporter's copyright was distinct from the copyright that Miss Ogilvy also enjoyed in her own words. In discussing and questioning the applicability in modern conditions of the case of *Walter v Steinkopff*,¹²⁷ in which North J had held that newspapers had no implied licence to reproduce verbatim reports which appeared in other newspapers, he noted that in that case the judge 'was not dealing with the use of quotations of words, being the words of a third party (for example, Miss Ogilvy) in whom the copyright of the words as opposed to the report of the words was vested.'¹²⁸ Thus, although there might now be a custom of the Press giving rise to an implied licence to reproduce each other's stories, 'it may well be that the case is different when the only relevant verbatim copying is not the copying of the

¹²⁶ *Ibid* at 366.

¹²⁷ [1892] 3 Ch 489.

¹²⁸ [1990] FSR at 369 (emphasis supplied).

reporter's words but the words of the interviewee.'¹²⁹

As already noted, the Canadian cases of *Gould Estate v Stoddart Publishing Co*,¹³⁰ and, in particular, *Hager v ECW Press Ltd*,¹³¹ hold that the interviewers who had obtained and published the quotations from their subjects (respectively Glenn Gould and Shania Twain) own the whole copyright in the record of the material which they had procured, and that the interviewee had no copyright at all. This was particularly important in the Gould case, since it meant that the deceased interviewee's estate had no right to prevent the interviewer's reproduction of his words (in *Hager*, by contrast, Twain was not a party and her rights, like those of Lord Rosebery in *Walter v Lane*, were not in issue). Combined with the requirement of fixation, which is also found in Canadian law, the result of these two cases is, as David Vaver has put it, the marginalisation of those who provide the substance of the work (the interviewee), and the celebration of those who provide its routine form (whether writing or some other form of recording).¹³² The result seems at odds with the support of the kind of individual creativity to which copyright offers protection.

In *Hager* Reed J supports his conclusion with quotations¹³³ of other passages from the judgment of Browne-Wilkinson VC in *Express Newspapers*, as follows:

Each of the original stories is made up of two elements. First, there is the news story as such; second, there are the quotations of the words used by the person interviewed ...

[T]he recorder of spoken words [has] a copyright in the record of those words as distinct from the work recorded.

¹²⁹ Ibid at 369.

¹³⁰ (1998) 161 DLR 4th 321 (Ontario CA).

¹³¹ [1999] 2 FC 287.

¹³² Vaver, *Copyright Law*, 65.

But both these quotations, which are actually far apart from each other in the *Browne-Wilkinson* judgment, are also wrenched from their contexts; and neither actually gives much, if any, support to the conclusion being drawn in the *Hager* case. They certainly cannot be taken as giving the ratio of the *Express Newspapers* decision, or as supporting the conclusion that only the interviewer has copyright in the end product of the interview. In fact, the whole thrust of what the Vice Chancellor says is to distinguish carefully between the report and the words being reported. The reporter's copyright is essentially concerned with the words in which the report is couched by the reporter and the selection and arrangement of any quotations from other persons which may be contained in the text (just as the selection and arrangement of a database is protected by copyright, rather than its content¹³⁴). Any rights in the words quoted themselves would, as *Browne-Wilkinson* VC expressly indicated in the passage quoted and italicised in the previous paragraph, fall to the interviewee.

US authority is also in line with the simple principle that a speaker owns the copyright in what she says (so long as it amounts to a work), and not the person who records what is said. The US Copyright Office states that in an interview each party has the right to claim copyright in his or her own expression in the absence of an agreement to the contrary,¹³⁵ and this position also emerges, albeit indirectly, in the US case law. *Hemingway v Random House* has already been discussed: there the court concluded that, if Hemingway had a copyright in his contributions to conversations with Hotchner, the latter had been licensed to publish them. At least two other cases make clear that the interviewer does not have copyright in the quotations which she obtains and records. In

¹³³ [1999] 2 FC at 303 (para 27).

¹³⁴ CDPA 1988 1988, s 3A. 'Database right' under the Copyright and Rights in Databases Regulations 1997 (SI 1997/3032) protects content against unauthorised extraction or re-utilisation of a substantial part thereof.

¹³⁵ Compendium II of Copyright Office Practice (1984), § 317 (not seen, but confirmed by email from the Office dated 4

Rokeach v AVCO Embassy Pictures,¹³⁶ a psychiatrist who had published a book containing statements made by his patients was held not to be the author of these statements and so, not being the owner of the copyright in them, was unable to prevent their use in another's play and a film. Similarly, in *Suid v Newsweek Magazine*,¹³⁷ the plaintiff quoted Michael Wayne, son of the film star John Wayne, in a book on American war films. *Newsweek* later used the same quotations in an article on John Wayne. The District Court for the District of Columbia held no copyright of the plaintiff had been infringed: 'the author of a factual work may not, without an assignment of copyright, claim copyright in statements made by others and reported in the work, since the author may not claim originality as to those statements.'¹³⁸

The strongest US case for the interviewee's copyright is *Craft v Kobler*,¹³⁹ where the plaintiff, who had been a close companion of Igor Stravinsky, had published several books on the composer, including 'conversation' books presented in the form of interviews between them. He successfully claimed infringement of copyright by the defendant's biography of Stravinsky, which was 'richly stocked'¹⁴⁰ with quotations of the composer taken from these interviews and other material (such as correspondence) published by the plaintiff. But Laval J noted: 'although Craft [the plaintiff] is not the author of the Stravinsky portions of his books, so that his copyright would not normally cover them, Stravinsky willed to Craft his own copyright in those books. This suit is brought primarily to protect the Stravinsky copyright interest which Craft inherited.'¹⁴¹ The case is

Sept 2003).

¹³⁶ 197 USPQ 155 (1978).

¹³⁷ 503 F Supp 146 (1980).

¹³⁸ *Ibid*, at 148. A 'release for publication' from the person quoted, falling short of an assignment, was held insufficient to give the plaintiff a copyright interest. Compare also *Warwick Film Productions Ltd v Eisinger* [1969] 1 Ch 508, a case on copyright in books on the trials of Oscar Wilde, in which it was held that an author could claim rights, not in those parts of his book which consisted of quotations from transcripts of the trials, but only in their collocation with other material in the book.

¹³⁹ 667 F Supp 120 (1987).

¹⁴⁰ *Ibid*, at 122.

¹⁴¹ *Ibid*.

thus consistent with the view that interviewees have copyright in their own words, independent of an interviewer's claims to any copyright that may exist in the questions.

A Conclusion

Arguments for the existence and, perhaps, extension of protection are somewhat unusual in current debates about copyright. Most discussion is more concerned to deplore the growth and expansion of copyright coverage, which is seen as driven predominantly by the commercial concerns of the entertainment and information industries, and as therefore requiring challenge to protect the interests of the consumer and user of the products of these industries.¹⁴² This article argues, however, that, at least with regard to the spoken word, copyright can be an effective way to protect the legitimate interests of the individual, in particular interests in privacy and in ensuring that one's spontaneous or extemporaneous speech is not exploited for gain by others without consent.

At least four of the major acts restricted under the 1988 Act unless the copyright owner agrees to them seem particularly relevant to the interests of the speaker in the subsequent use of his or her words: (i) copying the work; (ii) issuing copies of the work to the public; (iii) performing, showing or playing the work in public; and (iv) the new public communication right introduced under the Copyright in the Information Society Directive 2001, which includes broadcasting the work or including it in a cable programme service.¹⁴³ The possibilities of the first of these rights are limited at present by the requirement that a spoken work must be recorded before it can be protected by copyright, so that the speaker has no protection against direct unauthorised recording as such; but the other four are all highly useful in the prevention of subsequent exploitation of such

¹⁴² See e.g. C. Waelde and H. MacQueen, 'From entertainment to education: the scope of copyright' [2004] IPQ 259.

¹⁴³ CDPA 1988, ss 16-21, as amended by the Copyright and Related Rights Regulations 2003 (SI 2003, No 2498),

unauthorised recordings. In particular, the new public communication right will prove very helpful in tackling unauthorised dissemination of oral works on the Internet.

One of the difficulties in debating the legal protection of individual privacy is that the most obvious beneficiaries will be figures who are already well-known, whether as politicians, entertainers or media celebrities, and that the law will enable them to control or conceal information about themselves, mislead the public, and stifle the freedom of the press and of expression more generally. Yet, quite apart from the fact that even public figures may have a private life deserving of some protection from the curiosity of others,¹⁴⁴ however well-motivated, it is not clear that only such figures will be, or are, protected by copyright in speech.¹⁴⁵ A good example of a private individual who would have benefited from the recognition of a copyright in her words is the plaintiff in the *Gormley* case in Ireland.

The research upon which this article was initially based was triggered by consideration of the copyright position of oral historians and their interviewees, the latter being commonly private rather than public figures. Copyright does seem to provide useful guidance for both interviewer and interviewee in this context. By and large, it gives effect to the ethical concerns of those who work in this field, while not providing undue obstacles to the proper use of the rich historical resources available through the personal testimony of individuals. The interviewer is required to seek consent for the uses to which the interview will subsequently be put, and as a result the interviewee has the possibility of control over subsequent exploitation of her words. Moral rights

which implement European Parliament and Council Directive 2001/29/EC, art 3 (OJ 2001, L167/10).

¹⁴⁴ See e.g. *Douglas v Hello! Ltd* [2003] EMLR 31; [2004] EMLR 2 (both Lindsay J; subject to appeal at the time of writing); *Campbell v Mirror Group Newspapers* [2004] 2 WLR 1232 (HL).

¹⁴⁵ See also the European Court of Human Rights decision in *Peck v United Kingdom* [2003] 36 EHRR 41, for an example of protection of a non-celebrity's privacy under Article 8 ECHR.

give the interviewee a right to be identified,¹⁴⁶ with a concomitant right to be anonymous should the moral right be waived,¹⁴⁷ while the words of the interview must be treated with integrity; that is, in any subsequent treatment of the work, additions, deletions, alterations and adaptations which distort or mutilate the work, or are otherwise prejudicial to the honour or reputation of the speaker, constitute a wrong for which the owner of the moral right may recover damages.¹⁴⁸

Many of the organisations engaged in oral history work and the creation of sound archives already take quite elaborate precautions to obtain permissions from interviewees which cover those activities with the recording which fall within the scope of copyright. It is common practice for interviewers to ask the interviewee to complete and sign pre-prepared forms covering those aspects of copyright relevant to the ways in which the recording will be used subsequently.¹⁴⁹ It seems to be unusual for these forms to be outright assignments of the interviewee's copyright (in which case writing signed by the interviewee would be essential¹⁵⁰); instead they tend to be licences under which the interviewee retains ownership of the copyright but gives authorisation to what would otherwise be infringements. Thus a key point for those subsequently seeking access to and use of recordings is to know exactly what the interviewee originally licensed, so that if necessary further permission covering what is now intended can be obtained. The story of Lord Denning and A N Wilson illustrates the difficulties which may arise if the extent of the licence to reproduce what was said is left vague.

Licences need not, however, be in writing and may indeed be implied from facts and circumstances. When Marina Ogilvy sought out a journalist to tell him her story, it could readily be

¹⁴⁶ CDPA 1988, ss 77-79.

¹⁴⁷ CDPA 1988, s 87.

¹⁴⁸ CDPA 1988, ss 80-83.

¹⁴⁹ For some examples of such forms, see Ward, *Manual of Sound Archive Administration*, 49-50, 53-58.

implied that she was licensing publication of her remarks. If a politician chooses to respond to a journalist holding a microphone and surrounded by television cameras, the broadcasting organisation clearly has a licence to broadcast what is said. Similarly in the *Hemingway* case, a far-reaching licence in favour of Hotchner to reproduce verbatim versions of his conversations with Hemingway could readily be implied from the way the relationship had operated over several years.¹⁵¹ A licence, it is suggested, is a much better explanation of the outcome of the *Falwell* case than the Virginia court's view that there could be no copyright in a conversation. As the court itself remarked:

[P]laintiff wilfully and freely participated in the interview. An interview with members of the media is not a private conversation. Like a press conference, plaintiff in this action responded to questions in a spontaneous manner and not from a carefully prepared text or even from notes. Moreover, plaintiff was aware that his comments were not made in the context of a private conversation but rather were destined expressly for dissemination to the public.¹⁵²

On the other hand, when Martin Luther King gave an advance press release of his 'I have a dream' speech, the licence to publish what he said was held to be limited to the period for which it was news, and was for news use only; the licence did not extend to commercial reproduction and sale of sound recordings of the speech. What can be implied as licensed from giving an oral history interview is much foggier, however, as many interviewees will only have the dimmest notions of

¹⁵⁰ CDPA 1988, s 90(3).

¹⁵¹ Such licences may well be gratuitous and as a result, at any rate in English law, revocable until at least detrimental reliance from the licensee (see e.g. *Beckingham v Hodgens* [2003] EMLR 18 (CA)); but in Scots law, the enforceability of the gratuitous promise and contract (see H. L. MacQueen and J. M. Thomson, *Contract Law in Scotland* (Edinburgh: LexisNexis/Butterworths, 2000), ch 2.54-2.63) probably leads to a different result and avoids the difficulties inherent in the English position.

¹⁵² 521 F Supp 1204 at 1208 (1981).

the archival, research and public uses to which their words may later be put. Appropriate documentation has the advantage of making the position clear, as well as enabling the interviewee to place explicit restrictions on the kind of use to which the material may be put; for example, a bar to general access for a stated period of time. This was also an issue in Lord Denning's argument with the *Spectator* and A N Wilson, where he claimed to have written a letter to Wilson making clear that some of the interview should not be published.¹⁵³

Some of the concern that oral copyright will give too much protection to public figures by enabling them censor-like powers to prevent publication of indiscreet comments or conversations potentially damaging to their political, commercial or other interests may be met through consideration of the fair dealing and other defences available under the copyright legislation, which are designed to facilitate access to, and use of, otherwise protected material.¹⁵⁴ The most obviously relevant is fair dealing for the purpose of reporting current events,¹⁵⁵ which the courts have sought to interpret liberally, especially from the point of view of what events are current.¹⁵⁶ The public interest defence in copyright has also been given some cautious support by the courts,¹⁵⁷ although it is no longer clear how far it survives the apparent restriction of copyright exceptions from 31 October 2003 to those laid down by the regulations implementing the Information Society Directive.¹⁵⁸ The right of freedom of expression under Article 10 ECHR,

¹⁵³ See *The Times*, 10 September 1990.

¹⁵⁴ See CDPA 1988, ss 28-76.

¹⁵⁵ CDPA 1988, s 30(2) (unamended by the 2003 Regulations).

¹⁵⁶ *Pro Sieben Media AG v Carlton UK Television Ltd* [1999] FSR 610 (CA); *Hyde Park Residence Ltd v Yelland* [2000] RPC 604 (CA); *Newspaper Licensing Agency v Marks and Spencer plc* [2001] RPC 76 (CA), upheld on other grounds [2002] RPC 225 (HL); *Ashdown v Telegraph Newspapers* [2002] Ch 149. In some of these cases the fact that the work quoted was unpublished (which may be especially relevant with surreptitiously recorded material) has been taken as a factor indicating that unauthorised dealings with the material were unfair and so not protected under the exception.

¹⁵⁷ See CDPA 1988, s 171, and G. Davies, *Copyright and the Public Interest*, (London: Thomson/Sweet & Maxwell, 2nd ed, 2002), especially at ch 4.033-4.035.

¹⁵⁸ See European Parliament and Council Directive 2001/29/EC, recital 32 ('This Directive provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public.') The UK's implementing Regulations (above, note 143), make no reference to the public interest defence. Note also art 5(3)(o) of the Directive, allowing the continuation of exceptions other than those allowed in

which is given special status by the Human Rights Act 1998,¹⁵⁹ should also help to ensure that copyright protection does not over-reach itself.¹⁶⁰

But perhaps the most significant exception (because it deals specifically with copyright in speech) is provided by section 58 of the Copyright, Designs and Patents Act 1988, which says that where a record of spoken words is made, in writing or otherwise, for the purpose of (a) reporting current events, or (b) of communicating to the public the whole or part of the work, it is not an infringement of copyright in the words as a literary work to use the record or material taken from it, provided certain conditions are met. The conditions are that (i) the record is a direct record of the spoken words and is not taken from a previous record or from a broadcast; (ii) the making of the record was not prohibited by the speaker and, where copyright already subsisted in the work, did not infringe copyright; (iii) the use made of the record or material made from it is not of a kind prohibited by or on behalf of the speaker or copyright owner before the record was made; and (iv) the use is by or with the authority of a person who is lawfully in possession the record. The aim of this section is clearly to enable the media to report appropriate speech directly to the public.¹⁶¹

So far as oral history is concerned, section 58 seems to cover the interview recorded with broadcasting specifically in mind. If, for example, a broadcasting organisation obtained a film or sound recording from another archive for use in a programme, the record made for the programme would be taken from a previous record and the first condition would not be fulfilled. Similarly, in such a situation the original speaker would still have copyright in the words used, so use without

the Directive where they are of 'minor importance' and 'only concern analogue uses'.

¹⁵⁹ Human Rights Act 1998 s 12.

¹⁶⁰ See *Ashdown v Telegraph Group* [2002] Ch 149.

¹⁶¹ See further Cornish and Llewelyn, para 13.07. Section 58 may also cover art 5(3)(f) of the Infosoc Directive, which allows for the 'use of political speeches as well as extracts of public lectures or similar works or subject-matter to the extent justified by the informatory purpose'; the implementing Regulations (above, note 143) make no reference to this, presumably because it is thought to be caught by the general exceptions for news reporting.

the speaker's consent would infringe copyright, and fall foul of the second condition. The effect of the exception is that where an interview is recorded specifically for broadcasting, the broadcasting organisation has no need to obtain the speaker's licence for the broadcast, and that the speaker has the onus of prohibiting expressly any actions within the scope of copyright. Absent such an explicit prohibition, the broadcasting organisation is also able to use the material in programmes other than the one for which it was already made; an important point, as broadcasting organisations realise the archival potential of the material they have recorded, particularly with regard to digitisation and Internet dissemination. But the material must be used for reporting current events, or communication to the public, so that the permission does not extend to the production of videos, audio cassettes or CDs for general distribution.

'What is worth copying is worth protecting,' remarked Peterson J in a celebrated dictum in 1916.¹⁶² The material discussed in this article shows clearly the value many have had from copying the extempore speech of others, a value which they have not always been willing to share or pay for. True, the Peterson dictum can become an argument in a circle: copying something is only a wrong where the something is a copyright work, and mere copying by itself cannot prove that what has been copied is indeed such a work. But it does suggest that the copied subject matter has value for others, so as to justify further inquiry as to whether it also possesses the qualities of being a work which is literary and original in the copyright senses of those words. The article shows that peoples' spoken words can have those qualities, even in such relatively informal contexts as interviews and conversations. Sometimes, of course, copyright is not necessarily the protection which is required in the particular case, with perhaps the now extended action for breach of confidence being the most significant alternative legal avenue to protection of speech from the unsought intrusions of others. But with regard to the protection of the spoken word in its own

right, copyright appears to strike an apt balance between the interests of those uttering the words and those who, for a wide variety of reasons, would disseminate them to a wider world.

¹⁶² *University of London Press v University Tutorial Press* [1916] 2 Ch 601 at 610.